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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 314

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

No. 315

JOHN F. McCARTHY (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN REPLY FOR THE PETITIONER, JOHN F. McCARTHY

HENRY I. FILLMAN,
Counsel for Petitioner.

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I

The respondent concedes that McCarthy's attachment was not forbidden by the Executive Order. Therefore, the lien created by the levy of the attachment is valid.

At page 49 of his brief the respondent states:

> "Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. *Not attachments, but transfers, were controlled.* (Italics supplied.)

This is a concession by the respondent that McCarthy's attachment was not forbidden by the Executive Order and is valid. Indeed, he cannot take an opposite stand in the face of his stipulation. Therefore, it must follow that the lien created as a matter of New York law by the levy of the attachment upon the Reichsbank accounts is likewise valid.

In seeking to overcome the consequences flowing from his concession, the respondent attempts to bring these cases within the holding of *Propper* v. *Clark*, 337 U. S. 472, that the Executive Order prevented "shifts in title" to blocked property without Treasury authorization, by contending that Section 1 E of the Order prevented the acquisition of a "proprietary interest" in the Reichsbank accounts and that the levy of the attachment resulted in the "transfer" of such an interest, because "it is plain", says the respondent, at page 12, "that the accounts fall within the description 'evidences of indebtedness or evidences of ownership of property'." This contention is without legal basis and overlooks that in the *Propper* case this Court

said, at page 483, that litigation by local claimants in state courts against foreign owners could proceed "so long as payment could not be made without a license" for

> "Nothing in the Trading with the Enemy Act or regulations specifically forbids *eo nomine* litigation in state courts."

The prohibition in Section 1 E of the Order against "transfers * * * or dealings in, any, evidences of indebtedness or evidences of ownership of property", paraphrasing the Joint Resolution, covers, as Judge Learned Hand said in *United States* v. *Leiner*, 143 F. (2d) 298, 300, "the transfer of stocks and bonds". The Reichsbank accounts do not "fall within the description 'evidences of indebtedness or evidences of ownership of property'." This is manifest from an examination of the Order's history.

The Order rests upon and was issued pursuant to Section 5(b) of the Trading with the Enemy Act of 1917 (40 Stat. 415) which gave the President power to "investigate, regulate or prohibit" transactions in foreign exchange as well as the export or earmarking of coin, bullion or currency, transfers of credit "(except where relating solely to transactions to be executed wholly within the United States)", and transfers of evidences of indebtedness or ownership of property either between the United States and a foreign country, or between residents of foreign countries by any person within the United States. Section 5(b) was revised and amended in the 1933 crisis by the Emergency Bank Legislation of 1933 [Sec. 2, Act of March 9, 1933, 48 Stat. 1, 50 U. S. C. App. §5(b) (1940)], so as to permit its application not only during time of war, but also "during any other period of national emergency declared by the President". By this amendment, the President was authorized to regulate transfers of credit between or payments by banking institutions as defined by the President. There was, however, omitted from Section 5(b) the phrase authorizing the regula ion of transfers of "evi-

dences of indebtedness or of the ownership of property", which was originally contained therein. The section, as amended, was invoked in the Banking Holiday [Proclamation No. 2039, March 6, 1933, 31 Code Fed. Regs. (1939), §120.1], and in support of the Government's gold policy [Exec. Orders No. 6102, Apr. 5, 1933; No. 6111, Apr. 20, 1933; No. 6260, Aug. 28, 1933, 31 Code Fed. Regs. (1939), §§50.1-50.11, inc.].

When Germany invaded Norway and Denmark, the President invoked Sec. 5(b), and issued Executive Order No. 8389, freezing property in the United States in which "Norway or Denmark or any national thereof has at any time on or since April 8, 1940 had any interest", in order to assure that title in that property could not be acquired by Germany through the conquest of those countries. In view of the omission in the amendment of 1933 of the phrase authorizing the regulation of transfers of "evidences of indebtedness or of the ownership of property", the Order did not contain the present Section 1 E (See, Appendix, pp. 14-15). Some banks questioned the legality of the Order in so far as it affected stocks and bonds, although the Secretary of the Treasury, in General Ruling No. 2 of April 19, 1940 (5 F. R. 1474), had construed the Order to prohibit bank transfers of stock certificates from or into the names of blocked nationals, and also the delivery out of or receipt into blocked nationals' custody accounts of securities. To remove the doubt, Congress by Joint Resolution, introduced by Senator Wagner, and enacted on May 7, 1940 (54 Stat. 179), amended the Trading with the Enemy Act by re-inserting the provisions for regulations of dealings in "evidences of indebtedness or evidences of ownership of property", so that Section 5(b) would apply to stocks and other securities. By the Joint Resolution, Congress also "appproved and confirmed" the Order, and the regulations and general rulings issued thereunder. Thereupon, the Order was amended by incorporating therein the present Section 1 E.

That only stocks and bonds—not bank accounts—are covered by the wording of Section 1 E is apparent from the Senate Report on the Joint Resolution (S. Rep. No. 1496, 76th Congress, 3d Sess., 1940), the pertinent part of which is set forth in the Appendix hereto at pages 12 *et seq.*

Furthermore, the respondent errs in urging that the levy of the attachment, concededly valid, resulted in the acquisition of a "proprietary interest" in the accounts. He has overlooked the New York authorities referred to in our main brief which hold, as was held by the Federal Court in discussing the New York law in *Starr* v. *Moore*, 22 F. Cas. No. 13319, 3 McLean 542, that the levy of an attachment does not change the title to the attached property even though, as in the case of personalty, it may be taken into the possession and control of the Court's officer, but only enables the attaching creditor to obtain security for an anticipated judgment, and that the general property remains in the defendant-owner who may alienate such property subject to the lien of the attachment.

The respondent has also failed to understand the meaning of a "proprietary interest." "Proprietary" and "ownership" are synonymous. In *Ferguson* v. *Arthur*, 6 S. Ct. 861, 863, this Court said:

> "'Proprietary' is defined thus in the Imperial Dictionary: 'Belonging to ownership; as proprietary rights.' In Webster: 'Belonging or pertaining to a proprietor—' 'proprietor' being defined, 'One who has the legal right or exclusive title to anything, whether in possession or not; an owner.' In Worcester: 'Relating to a certain owner or proprietor.'"

Since the levy of McCarthy's attachment did not under New York law transfer to him the ownership of the Reichsbank accounts, it is clear that the respondent errs

in contending that McCarthy acquired a "proprietary interest" in those accounts by virtue of the levy of the attachment.

The respondent's argument does not nullify his concession that the attachment was not forbidden by the Order and the legal effect of the concession, namely, the levy is valid.

II

By Section 34 of The Trading with the Enemy Act, enacted in 1946, McCarthy's debt claim upon which he based his New York attachment action is entitled to a priority. Furthermore, this Section gives validity to his attachment against Reichsbank, and the lien created thereby.

The claim of McCarthy, as assignee of Congressman Mondell's estate, which was the basis of his action against Reichsbank arose prior to Congressman Mondell's death in 1939 and is one "for legal work, labor and services rendered" Reichsbank "at its special instance and request by Congressman Mondell" (R. 40).

Section 34(g) provides (respondent's brief, p. 63) that debt claims against vested assets of a debtor shall be paid in the following order of priority: (1) Wage and salary claims not to exceed $600; (2) Claims entitled to priority under Sections 191 and 193 of title 31 of the United States Code * * *; (3) All other *claims for services rendered*, for expenses incurred in connection with such services * * *; (4) All other debt claims.

Thus, the claim here is entitled to priority under Section 34, apart from the lien to which the Vesting Orders are subject by reason of the levy of the attachment.

Furthermore, Section 34(i) specifically provides as follows (respondent's brief, p. 64):

"Nothing contained in this section shall bar any person from the prosecution of any suit at law or in

equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder."

Section 34(i) is referred to in the report of the Committee on the Judiciary of the House (Report No. 2398, 79th Congress, 2d Session) on the bill which added Section 34 to the Trading with the Enemy Act, at page 15, in the following language:

"It provides that the debt claim provisions of the bill shall constitute the sole relief of creditors, *except for their right to sue the original debtor or any other person liable.*" (Italics supplied.)

At the time Section 34 became a part of the Trading with the Enemy Act, the freezing controls under Executive Order No. 8389, as amended, were in existence, and they are still in existence, with respect to assets in the United States of German and Japanese nationals. The Congress was aware that Executive Order No. 8389 was in effect at the time it passed the bill which added Section 34 to the Trading with the Enemy Act. In specifically providing that a creditor shall not be barred from suing his alien enemy debtor, the Congress recognized that such suits were not forbidden by the Executive Order and the regulations thereunder in force at the time of the enactment of the bill.

It must follow that the Congress recognized that an attachment against blocked assets within the United States of an alien enemy, necessary to confer jurisdiction upon the Court in any suit brought against the alien enemy, is valid, and was valid at the time Section 34 became a part of the Trading with the Enemy Act, and that the lien created thereby is also valid.

III

The respondent's argument that McCarthy's attachment was not necessary to confer jurisdiction upon the New York court in his action against Reichsbank to recover money in an action at law and that the attachment did not create a present fixed lien is not sustained by New York law.

At pp. 44-46, the respondent urges that McCarthy's attachment was not necessary in order to confer jurisdiction over the Reichsbank upon the New York court, and bases his contention upon a quoted portion of Section 232 (6) of the New York Civil Practic Act, *Feuchtwanger* v. *Central Hanover Bank and Trust Co., et al.*, 288 N. Y. 342, and certain decisions involving the law in other jurisdictions.

The respondent has failed to quote the following portion of Section 232 (6) of the New York Civil Practice Act:

> "or where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the State"

and has overlooked the decision of the New York Court of Appeals in *Dimmerling* v. *Andrews*, 236 N. Y. 43, cited at p. 18 of our main brief, which clearly held that in an action in New York, such as McCarthy's action in the New York Supreme Court (R. 40), to recover a sum of money only against a non-resident, such as Reichsbank, an order for publication may not be made and the Court cannot obtain jurisdiction of the non-resident defendant unless the defendant's property within the State has first been attached. Judge Andrews, writing for the unanimous Court of Appeals, said, at p. 46:

> "Therefore, when the Civil Practice Act was adopted the intent of the legislature was still further clarified. (Civ. Prac. Act, secs. 232, 493.) The latter section enu-

merates specifically the three classes of cases in which judgment for a sum of money might be obtained against a non-resident upon service by publication. The former consolidated sections 438 and 439 of the Code. Certain verbal alterations were made as to provisions contained in section 438; a new clause was added and then applying to all these provisions, some of which contemplated actions *in rem* where no attachment was required and others actions *in personam*, there was also added the condition that the order must be founded on a verified complaint showing a cause of action against the defendant (actions *in rem*) or in an action *in personam*, a complaint and proof that a warrant of attachment had been levied upon the defendant's property. The intent is unmistakable. *Whatever may have been the former rule now no order of publication in an action to recover a sum of money only against a non-resident may be made except upon proof that his property has been seized.*

"This being so, the action of the Special Term and of the Appellate Division in this case was erroneous. The defendants were non-residents. *The action is to recover a sum of money only.* An order of publication was obtained against them as individuals on July 19, 1922. The papers upon which it was based did not show that any warrant of attachment had been levied upon their property. As a matter of fact such warrant was granted and the levy made only some seven or eight days later. No jurisdiction of the defendants was obtained. There was no authority for the order and it and subsequent proceedings based upon it were without jurisdiction." (Italics supplied.)

The *Feuchtwanger* case is completely irrelevant on the proposition urged by respondent for the plaintiff there did not seek to recover a sum of money only in an action at law but sought to impress a trust upon the deposits

in an action in equity, whereas here McCarthy sought to recover a sum of money only in an action at law.

The decisions involving the jurisdiction of courts of other states referred to by the respondent have no application here. New York law as to jurisdiction upon a non-resident in an action to recover a sum of money only is involved.

In seeking to bolster his argument, the respondent refers, at page 46 of his brief, to the fact that in some states an attachment is not deemed to give a lien prior to a judgment or execution thereof and quotes from Justice Cardozo's opinion in *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, thereby attempting to indicate that in New York McCarthy's attachment did not create a lien when it was levied. But, in quoting from Justice Cardozo's opinion, the respondent has failed to quote the following statement of the learned justice, at pages 207-208, which cites *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, to the effect that McCarthy's attachment did create a fixed and present lien when levied:

> "What has been written does not go beyond the law as declared in Illinois. The fact is not ignored that there are other jurisdictions in which the process of garnishment receives a different meaning. *Sometimes the service of the writ is held to impose upon the debt a fixed and present lien which will have recognition and enforcement everywhere.* See, e. g., *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101; *Wallace* v. *McConnell*, 13 Pet. 136, 10 L. Ed. 95; In re Ransford (C. C. A.) 194 F. 658, 661; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144." (Italics supplied.)

In view of the foregoing, the respondent's argument is not sustained by the law of New York.

IV

The respondent's statement that McCarthy is resisting the Custodian's claim to property that was enemy-owned on June 14, 1941, is incorrect.

At page 21 of his brief, the respondent states that McCarthy is seeking "to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941" by a lien which McCarthy claims "to have acquired subsequent to that date" and which he asserts to be indefeasible.

The United States was not at war with Germany on June 14, 1941, when the freezing order was made applicable to German property within the United States, and therefore, the property was not "enemy-owned on June 14, 1941." Furthermore, it was not until March 11, 1942, after McCarthy's attachment, that the President by Executive Order 9095 (7 F. R. 1971) established the office of Alien Property Custodian and delegated to the Custodian the powers granted by Section 5 (b) of the Trading with the Enemy Act.

Furthermore, the respondent did not seek in his proceedings in the District Court a decree which would direct that the attached accounts be turned over to him for, as we pointed out at page 11 of our main brief, the respondent took the position in the District Court that he did not seek an order directing that the funds be surrendered to him and that he was only seeking a decree which he could submit to the New York Supreme Court in later appropriate proceedings to be instituted by him in that court to vacate the attachment. This the respondent does not deny.

Thus, the Custodian was not asserting a claim to the attached property. He took the first step in seeking eventually to nullify the validity of McCarthy's attachment lien.

McCarthy is not attacking the Vesting Orders. He contends that the claim of the Custodian thereunder is subject to the lien of his attachment which the respondent admits is valid.

V

The judgments of the Court below should be reversed.

Respectfully submitted,

HENRY I. FILLMAN,
Counsel for Petitioner.

February 26, 1951.

Appendix

1. Senate Report No. 1496, 76th Congress, 3d Session.

* * * *

"The Committee on Banking and Currency, to whom was referred the joint resolution (S. J. Res. 252) to amend section 5 (b) of the act of October 6, 1917, as amended, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

"The provisions of the resolution were recommended to Congress by the Secretary of the Treasury.

"The purpose of the resolution is to remove any doubt that section 5(b) of the act of October 6, 1917, as amended, authorizes the President to regulate transactions in evidences of indebtedness and evidences of ownership of property in which foreigners have an interest, and to require reports concerning all foreign-owned property.

"The resolution is made necessary by certain questions which have arisen in connection with the Executive order of April 10, 1940, and regulations issued thereunder by the Secretary of the Treasury. The order and regulations were issued pursuant to the authority conferred by section 5(b) of the act of October 6, 1917, as finally amended by section 2 of the act of March 9, 1933. The order and regulations have imposed certain restrictions on transactions in property in which Norway and Denmark or nationals thereof have an interest and have set up a system of licensing transactions in such property.

"The Treasury Department has ruled that the order and regulations of April 10, 1940, apply to transactions in Danish and Norwegian stock and other securities which unquestionably constitute a substantial portion of the property of those countries situated in the United States. With this interpretation of the statute, the order and

regulations this committee is in agreement. It believes that when Congress enacted the act of March 9, 1933, it intended to grant to the President all of the powers conferred upon him by section 5(b) of the act of October 6, 1917, and to authorize him to exercise all of such powers not only in time of war, but during any other period of national emergency. Under the original provision there is no doubt that the President was authorized to regulate transactions in stock and other securities, etc. Notwithstanding this apparent intention of the Congress, a few lawyers for banking institutions have expressed doubts as to whether the President is authorized to regulate transactions in foreign-owned stock and securities. The committee is convinced that the matter is of such great importance that doubts of this character should immediately be removed by a clarifying amendment. Not only is authority to regulate transactions in stock and other securities essential to the system of control already in force, but it may be of even greater importance if it becomes necessary to extend such control to property of other countries which to an even greater extent is in the form of stock and securities. Such an amendment will also serve to protect Americans complying with the order. The banks, in particular, would favor such a clarifying amendment."

"The action taken by the President and the Treasury Department in regulating transactions in Danish and Norwegian property has received the unanimous approval of the public. Section 2 of the resolution provides Congress with a means of expressing its agreement as to the soundness, wisdom, and propriety of such action. Documents indicating the exact character of the action taken are printed as a part of this report.

"Your committee believe that the resolution is meritorious legislation and should be promptly enacted into law.

Appendix

"Executive Order of April 10, 1940, Regulations of the Secretary of the Treasury of April 10, 1940, and General Rulings Issued Thereunder.

EXECUTIVE ORDER

"Amendment of Executive Order No. 6560, dated January 15, 1934, regulating transactions in Foreign Exchange, transfers of credit, and the export of coin and currency.

"By virtue of the authority vested in me by section 5 (b) of the Act of October 6, 1917 (40 Stat. 411), as amended by section 2 of the Act of March 9, 1933 (48 Stat. 1), and by virtue of all other authority vested in me, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby amend Executive Order No. 6560, dated January 15, 1934, regulating transactions in foreign exchange, transfers of credit, and the export of coin and currency by adding the following sections after section 8 thereof:

'SECTION 9. Notwithstanding any of the provisions of sections 1 to 8, inclusive, of this Order, all of the following are prohibited, except as specifically authorized in regulations or licenses issued by the Secretary of the Treasury pursuant to this Order, if involving property in which Norway or Denmark or any national thereof has at any time on or since April 8, 1940, had any interest of any nature whatsoever, direct or indirect:

'A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside of the United States, of a banking institution within the United States);

'B. All payments by any banking institution within the United States;

'C. All transactions in foreign exchange by any person within the United States;

'D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States; and

'E. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

THE WHITE HOUSE FRANKLIN D. ROOSEVELT.' ''

April 10, 1940, 6 p. m., E.S.T.